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IN THE

Supreme Court of the United States

Nos. 37 and 38 October Term—1949

37 UNITED STATES OF AMERICA,
Petitioner,

vs.

YORKSHIRE INSURANCE COMPANY,
Respondent.

38 UNITED STATES OF AMERICA,
Petitioner,

vs.

THE HOME INSURANCE COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS

ABRAHAM FRANKEL,
Attorney for Respondents.

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BRIEF FOR RESPONDENTS

The respondents have no objection to petitioner's statement of the opinion below, the jurisdiction and the statutes involved.

The statement of facts presented by the petitioner is substantially correct, requiring only the following clarification. The total amount of the property damage loss caused by the fire is covered by the payments made by the respondents. It is not to be inferred, as intended by the United States, that outstanding claims exist in the insured or other persons with respect to the property damage loss (Br. 4).

Question Presented

1. Whether two insurance company subrogees may sue the United States in their own names, as real parties in interest, on claims admittedly actionable under the Federal Tort Claims Act, Act of August 2, 1946, c. 753, Title IV, 60 Stat. 842,[1] and whether such suits are prohibited by the language of the Federal Anti-Assignment Statute, R.S. 3477, 31 U. S. C. 203.[2]

Preliminary Analysis

Respondents will argue the following points:

1. A subrogee, partial or whole, is an equitable assignee by operation of law and such claim is actionable under the Tort Claims Act and does not fall within the prohibition of R.S. 3477.

2. A subrogee, partial or whole, is the holder of a substantive right under the Tort Claims Act, qualifies as a real party in interest under Rule 17a of the Federal Rules of Civil Procedure, and may sue the United States in its own name.

Preliminary Comment

A review of the positions assumed and the legal arguments advanced by the United States in this Court and in the Courts below have been wholly inconsistent and irreconcilable requires comment thereon for purposes of enlightenment. The United States has pursued a course of changing and shifting its position in each Court in these proceedings. The primary and basic issues involved have become deeply confused and largely beclouded by such legalistic gyrations.

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[1] Hereinafter referred to as the Tort Claims Act.

[2] Hereinafter referred to as R.S. 3477.

In the District Court the United States attacked on purely substantive grounds, the right of a subrogee to sue. It moved for dismissal of the complaints on two grounds; first, that the Tort Claims Act did not permit derivative suits; and secondly, that the suits were prohibited by the terms of R.S. 3477 (R. 4-6). On examination of the Order of Dismissal in the District Court it appears that the judgment of the Court was based entirely on the first ground, since R.S. 3477 was not urged by the United States and was not considered by the Court. The order fails to disclose any mention of or reference thereto (R. 6). We may conclude that the disposition of the motions in the District Court was based solely on a substantive ground. The Court applied a rigid and narrow construction of the Tort Claims Act and rested its decision on the ground that the Tort Claims Act "does not expressly grant consent to suit by the subrogee of a claimant and that consent of the government to be sued being a relinquishment of sovereign immunity, must be strictly interpreted (R. 6)."

The respondents appealed to the Court below to establish the substantive right of a subrogee to sue under the Tort Claims Act and establish that such suit was not precluded by R.S. 3477. The respondents moved forward to test the questions on purely substantive arguments and the brief filed below treated the subject in such manner. Although the United States contended in its petition for rehearing (R. 13, 14) that it did not abandon its position in the Court below and conceded that a subrogee may sue under the Tort Claims Act and is not precluded by R.S. 3477, it is clearly evident from the opinion of the Court below that the United States retreated from its former position. It did not press the points urged in the District Court and made objection on purely procedural grounds (R. 7-11, 15). The United States no longer contended that a subrogee did not enjoy a substantive right under the language and purposes of the Tort Claims Act. It attempted to defeat this substantive right on proced-

ural grounds that it raised for the first time in the Court below (R. 10).

The final shift in the argument of the petitioner is now made in this Court. For the first time, R.S. 3477 heretofore abandoned in the Court below, is raised as a substantive ground to bar a suit in the name of an insurance company subrogee.

Argument

I. The United States invokes R.S. 3477, to bar a recovery of a judgment by an insurance company subrogee suing in its own name under the Tort Claims Act. It contends that R.S. 3477 forbids every transfer or assignment, whether equitable or express, and that the right of a subrogee falls within both the express language and alleged protective purposes of the statute (Br. 6, 7). The government now urges for the first time that the policy, function and purposes of R.S. 3477 was adopted to protect certain statutory and administrative rights in the settlement, compromise, or prosecution of claims against the United States.

It is our contention that R.S. 3477 does not apply to a suit by a subrogee under the Tort Claims Act. The government assumes that an equitable assignment by subrogation falls within both the express language and the protective purposes of the statute (Br. 6). We submit that a subrogee, an equitable assignee of a claim by operation of law, does not come within the prohibition of said act. *American Tobacco Co.* v. *United States*, 166 U. S. 468, affirming 32 C. Cls. 207; *Western Pacific Railroad Company* v. *United States*, 268 U. S. 271. The Circuit Courts of this land, in dealing directly with the statute, have expressly repudiated the contention made by the government. *State Farm Mutual Liability Insurance Co.* v. *United States of America*, 172 F. 2nd, 737 (C. A. 1); *Aetna Casualty and*

Surety Co. v. *United States of America*, 170 F. 2nd, 469 (C. A. 2); *United States of America* v. *South Carolina Highway Department, et al.*, 171 F. 2nd, 893 (C. A. 4); *Old Colony Insurance Co.* v. *United States of America*, 168 F. 2nd, 931 (C. A. 6); *Employers Fire Insurance Co.* v. *United States of America*, 167 F. 2nd, 655 (C. A. 9); *United States of America* v. *Donald Harding, et al.*, 171 F. 2nd, 550 (C. A. 10); *United States of America* v. *Chicago, Rock Island & Pac. Ry. Co.*, 171 F. 2nd, 377 (C. A. 10); *National American Fire Insurance Co. of Omaha* v. *United States*, 171 F. 2nd, 206 (C. A. 9); *3 Moore Federal Practice* (2nd Ed. 1948) Sec. 17.09, p. 1349.

The broad and sweeping waiver of governmental immunity against suit under the Tort Claims Act is not to be limited by the prohibition contained in R.S. 3477 if the liberal purposes and objects of the Tort Claims Act are to be completely effectuated. It can not be gainsaid that the government in its brief and in the briefs filed in the companion cases of *United States* v. *Aetna Casualty and Surety Company*, No. 35 this Term, and *United States* v. *World Fire and Marine Insurance Company*, No. 36 this Term, does not freely admit that a subrogee enjoys a substantive right under the Tort Claims Act. The government now questions and attacks in these cases the method of procedure and the manner in which the claim of a subrogee can be enforced. The government resists the right of a subrogee to sue in its own name as being in violation of R.S. 3477 (Br. 9, 10). Upon admission of the substantive right, we submit that no restraints or restrictions can be imposed thereon to prevent the complete fulfillment of such right by recovery of a judgment in the name of the subrogee.

To overcome the established law exempting the claim of a subrogee from the prohibition of R.S. 3477, the government presents a specious and untenable argument. It

contends that R.S. 3477 must be invoked as a bar to an action by a subrogee because the policy, purpose and function of the act provides the government certain protection in regard to statutory and administrative rights to which it is entitled in the handling of claims against the United States.

It must be kept in mind that R.S. 3477 was enacted in 1853 at a time when the doctrine of sovereign immunity was deeply rooted in the jurisprudence of this land. The principal object of the statute was to protect the government and prevent frauds upon the Treasury of the United States. Indeed, the act is so entitled. *Western Pacific Railroad Company* v. *United States*, 268 U. S. 271; *United States* v. *Gillis*, 95 U. S. 407. The government now seeks to extend the application of the act by ascribing to it certain purposes, policy and function that did not exist at the time of its enactment and were never contemplated by Congress in the passage of this law. It would be a strange construction of the act to hold that it protects the government in regard to certain statutory rights and administrative benefits which were non-existent at the time of the enactment of the law.

In pressing for an extension of the application of R.S. 3477 the government maintains that the purposes and objects of the statute were intended to afford to it the following protective rights. For purposes of convenience we divide these matters into two categories, administrative and judicial.

1. Administrative

(a) No embarrassment to United States in settlement and compromise of claim with original claimant.

(b) No interference with examination, allowance and payment of claim by proper officers of United States.

(c) Preserve simplicity and expedition in handling of claims.

(d) Avoid harrassment and uncertainty far exceeding that to which United States is exposed in written assignments for the reason that subrogation is secret and United States has no notice or lacks detailed knowledge required for correct appraisement.

2. Judicial

(a) No interference with any action United States may take by way of offset under 31 U. S. C. 71 and 227.

(b) Protect United States from involvement in controversies between subrogees or other assignees, and compel United States to litigate complicated issues between them and insured.

(c) Preserve to government important statutory rights as to venue and counterclaim.

(d) Protection against possible double payment and multiplicity of suits.

Assuming, but not conceding, that the purposes of R.S. 3477 may be extended to provide the government with the above enumerated protective rights, we submit that such rights are neither impaired nor expunged in a suit by a subrogee in its own name. By the doctrine of subrogation, the insurer upon payment to its insured of a loss, total or partial, becomes subrogated in a corresponding amount to the insured's cause of action against the tortfeasor. The right of a subrogee arises independently of contract or any formal assignment. *Liverpool and Great Western Steam Company* v. *Phenix Insurance Company*, 129 U. S. 397; *Aetna Life Insurance Co.* v. *Middleport*,

124 U. S. 534. On payment of a loss by way of indemnification, a substantive right is conferred upon the insurer by the doctrine of subrogation. The insurer then becomes the equitable holder and owner of the cause of action against the third party tort-feasor to the extent of the payment made. The insurer now stands in the very shoes of the insured in asserting this cause of action against the tort-feasor. Since equitable title to the claim is held by the subrogee, the party to whom payment should be made and with whom all negotiations should be had concerning the claim, we fail to perceive how the government will be prejudiced in the exercise of any statutory or administrative rights. On payment of the property damage loss by the insurer to the insured, the interest of the insured in a cause of action against the tort-feasor has been expunged to the extent of such payment. To this extent, a cause of action exists in favor of the subrogee under the Tort Claims Act. In the first instance, the loss is that of the insured, after reimbursement or compromise, it becomes the loss of the insurer. *Old Colony Insurance Company* v. *United States, supra.* The subrogee becomes the equitable owner of the very rights of the individual who suffered injury to his personal property. *Niagara Fire Insurance Company* v. *United States,* 76 F. Supp. 850, 855.

In view of the universal practice in the handling of subrogation claims, the third party tort-feasor is not exposed to any peril, harrassment, uncertainty, delay or interference with the examination of or possible settlement and compromise of such claims in dealing directly with the subrogee rather than the insured. There is nothing secret or mysterious about the nature or character of a subrogation claim, as charged by the government (Br. 8). The existence and extent of subrogation as shown in the instant cases are readily disclosed by the mere examination of the complaints filed (R. 1-3). To obtain correct appraisal of

said subrogation rights and more detailed information concerning the existence and extent thereof, the machinery concerning discovery in the Federal Courts is available to the United States as to any other private litigant under the Federal Rules. On the contrary, an action filed in the name of the insured only without indicating the rights or interests of an insurer is far more secretive than a suit filed in the name of the subrogee.

The government misconceives the practical aspects of subrogation when it seeks to preserve its right to deal with the insured who has no further interest in the claim. As shown above, the insurer is the owner of the cause of action to the extent of payment made and therefore is the proper party to be dealt with. The government will be subjected to harrassment, embarrassment and delay if it deals with the insured and not the insurer.

The government complains that it may become embroiled in conflicting claims of the insurers or in disputes between the insurers and the insured. Assuming for this argument that the government is entitled to protection against embroilment and conflicting claims, the objection raised does not apply herein. Such problems have no basis in fact, they are creatures of an imaginary hypothesis. The disputes that may arise between insurer and insured precede the settlement and payment of the loss. The sums due from each carrier on the adjustment of a fire loss may possibly create disputes between them before a complete adjustment of the loss is concluded. On final adjustment, such disputes have been previously resolved and precede payment of the loss to the insured. Thus it is observed that disputes, if any, between insurers and insured or between co-insurers are settled before payment is made. Since the right of subrogation arises after payment is made, the assertion of such right by a subrogee against the government can not embroil the United States in conflicting claims and disputes.

The foregoing discussion has been devoted to a treatment of the administrative problems, which we submit do not exist in the instant cases or in the administration of subrogation claims generally. Assuming that such problems may arise, the same are not insuperable and are readily soluble without imposing any hardship or burden upon the government. We submit that such administrative problems, under no circumstances, should defeat the substantive right of a subrogee to sue in its own name.

The second class of objections characterized above as judicial, relates to the government's contention that the sole purpose and effect of R.S. 3477 is to preserve the government's rights in respect of venue, counterclaim and offset, and further, to avoid the possibility of double payment and multiplicity of suits (Br. 8, 10). It is a strained argument that suggests that the purposes and objects of R.S. 3477 shall be construed to afford such statutory rights to the government. Assuming these rights do exist, we submit the same are not violated by a suit in the name of a subrogee under the Tort Claims Act.

A venue provision is found in the language of the Tort Claims Act. It provides that a tort action against the United States shall be filed in the district where the plaintiff resides or where the tort occurred, 28 U. S. C. 1402 (b). The instant suits were filed in accordance with that provision in the district where the alleged cause of action arose. The suits were filed in the very district where the insured resides. The government has not been harmed with regard to its right of venue. The objection with respect to venue has no merit from a practical appraisal of an ordinary subrogation suit. Since the rights of the insurer depend solely upon the rights and remedies of the insured, the suit will generally be filed in the judicial district where the insured resides or the cause of action arises.

The government urges next that it will be deprived of the statutory right of counterclaim against the insured if a

suit is permitted in the name of the insurer subrogee. This question was recognized and satisfactorily disposed of in the learned opinion rendered in the Circuit Court in the companion case of *Aetna Casualty and Surety Company* v. *United States, supra.* The Court stated at 170 F. 2nd, 471:

> "Although we do not know whether the government intends to assert a counterclaim in this case, we cannot reserve consideration of this argument until a case arises involving a counterclaim; we think Congress did not intend to make the 'involuntary' assignee's right to sue dependent upon the government's assertion or non-assertion of a counterclaim against the employee."

It does not appear in the instant cases that the government intends to assert a counterclaim against the insured. Following the date of entry of judgment in the Court below and prior to the application for a writ of certiorari in this Court, the government filed an answer of general denial in the District Court. Therefore, the question of asserting a counterclaim is not before the Court.

Assuming the government desires to assert a counterclaim against the insured, we submit this right is not prejudiced or denied in a suit filed by a subrogee in its own name. The government may obtain this relief by making timely application to join the insured in this suit under Federal Rule 19 (b). The insured resides within the jurisdiction of the Court where suit was filed and is amenable to the service of process. The fundamental right of a subrogee to sue in its own name is paramount and not to be defeated by the procedural problems that may face the government in asserting a counterclaim against the insured.

The offset statute, 31 U. S. C. 71 and 227, is raised by the government to narrow a construction of the Tort Claims Act and deprive a subrogee the right to sue in its

own name. A statutory offset is, by its very nature, a defensive measure. It must be governed by the rules of procedure relating generally to counterclaim and set-off. By the very language of the offset statute, the government is not denied any fundamental right as it may assert this right of offset in an affirmative suit if the indebtedness to the government is denied. Certainly a right which is asserted only after judgment is recovered is not the test or criterion to determine in whose name suit should be filed. We submit that the fundamental right of subrogation, conferred upon the respondents under the Tort Claims Act, should not be limited or restricted by this statutory right of offset, and in this sense this objection should be relegated to the inoffensive category of counterclaim and set-off. *State Farm Mutual Liability Insurance Co.* v. *United States of America, supra; Aetna Casualty and Surety Co* v. *United States of America, supra; United States of America* v. *South Carolina Highway Department, et al., supra.*

The final objection raised by the government is that R.S. 3477 intended to protect it against splitting of a cause of action and consequent multiple suits. We submit that the government is not subjected to a multiplicity of suits in these cases. A single tort may give rise to several claims that are cognizable under the Tort Claims Act. In the present cases the total property damage loss for which recovery is being sought is represented by the two suits filed by the respondents. This question was considered and resolved most satisfactorily by the Court below. The Court stated as follows (R. 9-11):

> "The only reason for preventing suit by the partial subrogee alone, is, as in the case of the partial assignee, to preclude inconvenience and expense to a defendant who might be required to defend a number of separate suits arising out of a single claim, if the rule were otherwise. It is, therefore, clear that the rule of one claim, one lawsuit, is for the benefit

of the defendant, and he is the one who should make a timely claim to join the necessary parties. It is a right which may be waived by a defendant, and it has been so held in federal cases applying state procedural codes under the Conformity Act and by state courts."

"The United States should have immunity from a multiplicity of suits upon one obligation; but it should pay that obligation if it is found to exist under the statute. It appears that a motion to add further parties was made and dismissed by the District Court for coming out of time. If the property owner is barred by lapse of time and there are no other claimants the defendant need not be subjected to a multiplicity of suits. Rule 42 providing for consolidation is very broad; so is Rule 21 for adding or dropping parties. The liberal provision for amendment in Rule 15 makes possible the allegation of existence or non-existence of other possible claimants"

A case involving an analogous situation is found in *Gaugler* v. *Chicago, M. & P. S. Ry. Co.*, 197 Fed. 79, 82 (D. Ct., D. Mont., 1912). The Court stated as follows:

"It is clear there is no separable controversy herein. There is but a single cause of action involved, viz., the right of the insured, the invasion thereof by the negligence of defendant in the destruction of the insured's property, and the damages thereby inflicted. That the insurers are equitable assignees of the insured are interested therein to the extent of their payments to the insured, and are interested in proving the negligence and in sharing the damages, does not create other causes of action, legal or equitable, against defendant. It is still one cause of action, a single controversy owned in common by the insured and the insurers."

This problem of splitting of causes of actions and possible multiplicity of suits must necessarily be resolved under the Federal Rules of Civil Procedure relating to con-

solidation of actions and the adding and dropping of parties (Federal Rules 21, 42). *United States of America* v. *South Carolina Highway Department, et al., supra.* A claim of a subrogee, whether partial or whole, is not a divided one but represents a separate and distinct cause of action in its favor by reason of having made payment to the insured and is subrogated in a corresponding amount to the insured's right of action against the tort feasor. To protect a defendant, the several claims arising from a single tort should properly be joined in one suit. The government, in these cases, can receive similar protection by way of consolidation (Federal Rule 42). The claims of subrogees are not split or divided ones, but represent a substantive right that each subrogee enjoys to the amount of the loss which it paid and the aggregate of such claims represents the whole property damage loss caused by the tort feasor. There is nothing in the record at this stage to indicate that the insured has any claim arising from the loss and clearly she has no interest in the claims of the insurers.

To conclude, we submit that by the very language of the Tort Claims Act itself, claims filed thereunder are to be governed by the Federal Rules of Civil Procedure, 60 Stat. 844, Sec. 411. The so-called statutory rights and other protection sought by the government, which it contends was intended by R.S. 3477, are secured to the government by proper application of the Federal Rules. However, we submit further that R.S. 3477 does not apply to a suit by a subrogee in its own name. Statutory rights or other protective rights sought by the government are not damaged or destroyed by the refusal to invoke the provisions of R.S. 3477.

2. The second part of the government's brief deals more particularly with the decision of the Court below. It is based upon the erroneous premise that the lower Court

declined to apply R.S. 3477 and considered the questions as procedural ones to be resolved through the application of the Federal Rules of Civil Procedure. The lower Court was not called upon to consider the prohibition of R.S. 3477, so consequently, its decision is not grounded upon any construction of said statute. The government now contends that the lower Court erred in holding that a subrogee is a real party in interest under Federal Rule 17 (a), entitling it to sue in its own name, as it denies the government the right to assert and exercise certain statutory rights similar to those heretofore raised in its attempt to invoke R.S. 3477 as a bar to a suit by a subrogee in its own name. *Ergo*, the alleged denial of such statutory rights disqualifies the insurer as a real party in interest.

The government impliedly admits that the Federal Rules of Civil Procedure on proper application, provide it with the protection that is sought (Br. 11). It urges that greater protection is secured to it by R.S. 3477 (Br. 11, 12). In sum, the government maintains again that permission to a subrogee to sue in its own name either damages or destroys the basic rights of the United States concerning venue, counterclaim, offset, possible double payment and multiplicity of suits.

We submit that all of these matters are not material in the present cases, nor to subrogation cases generally. They present defensive measures that do not determine in whose name a suit may be filed.

In view of the government's admission that a subrogee holds a substantive right for recovery under the Tort Claims Act, and is entitled to be paid for a tort committed by the government that is actionable under the Act, the simple issue for decision is whether a subrogee is a real party in interest under Federal Rule 17 (a), and permitted to file a suit in its own name (Br. 9, 10). Under Federal Rule 17 (a), requiring every action to be prosecuted in the

name of the real party in interest, it is well settled that an action should be prosecuted in the name of the party who, by the substantive law, has the right sought to be enforced. 3 Moore Federal Practice (2nd Ed., 1948), Sec. 17.07, p. 1330. On application of this test, the insurance company subrogee qualifies as a real party in interest. This ruling likewise applies to a partial subrogee whose equitable rights in the cause of action qualifies it as a real party in interest.

This basic principle of real party in interest is found in the positive language of Judge Goodrich speaking for the Court below. This opinion states (R. 9):

> "The problem then arises as to the procedural position of a partial subrogee (insurer) under the Federal Rules. There can be little doubt that his equitable rights in any recovery made by the subrogor (insured) qualify the subrogee as a real party in interest under Rule 17 (a). Both insured and insurer 'own' portions of the substantive right against

In the case of *State Farm Mutual Liability Insurance Co. v. United States, supra,* the Court also held a partial subrogee to be a real party in interest. The Court stated, 172 Fed. 2nd, at page 739:

> "In view of the universally recognized equitable principal of subrogation, an insurance company having paid the whole loss, is the real party in interest within the meaning of Rule 17a, Federal Rules of Civil Procedure. (*Cases and statutes cited*). (Under Sec. 411, 28 U. S. C., Sec. 932 [See revised Sec. 1346]. The Federal Rules of Civil Procedure were made applicable to suits under the Federal Tort Claims Act). In the case at bar, appellant is only a partial subrogee, which may involve a problem of splitting cause of action. We think that a partial subrogee is a real party in interest, under Rule 17a, and as such has standing to sue in its own name, subject only to the right of ~~the~~ defendant, by the tort feasor."

making timely objection, to insist upon the joinder of the other parties in interest in order to avoid a split up of the cause of action." (italics mine)

See *Old Colony Insurance Company* v. *United States*, *supra*.

There is no denial that R.S. 3477 forms a part of the substantive law. We do not urge that this statute was repealed by the real party in interest provision under the Federal Rules of Civil Procedure. 3 Moore Federal Practice (2nd Ed., 1948), Sec. 17.09, p. 1338. These laws have separate spheres of operation, are mutually independent and not repugnant. In a proper case R.S. 3477 may be invoked to determine the substantive right, its function then ceases. If a substantive right exists that is not violative of the terms of R.S. 3477, then Federal Rule 17 (a) permits such party to sue in its own name as a real party in interest. *McWhirter* v. *Otis Elevator Co.*, 40 F. Supp. 1 (D. Ct., W. D. S. C., 1941).

The government avers that the correct and only workable rule is that the person originally sustaining the loss is *the* "real party in interest" under Rule 17 (a) (Br. 17, 18). An application of this rule defeats the right of a subrogee to assert in its own name a substantive right conferred by the Tort Claims Act. This rule, if applied, ignores and violates the basic doctrine of subrogation that permits the insurer to assert the rights and remedies of the insured against the tort feasor to the extent to which payment was made.

We admit that the insured may be a real party in interest in a case of partial subrogation. The insured qualifies as such by retaining a portion of the substantive right against the tort feasor. However, the insured is not the only real party in interest as urged by the government. Both the insured and insurers may be real parties in interest in a proper case. Each may sue individually to re-

cover its respective interest, subject to joinder on motion of a defendant. *First National Bank of Bloomingdale* v. *Manufacturers Trust Co.* (D. N. J., 1941), 5 Pike and Fischer Fed. Rules Serv. 17a. 141, Case 1. Since the requirement of joinder is solely for the protection of the defendant, it should be imposed only upon its insistence. The failure of the defendant to make a seasonable objection to the non-joinder should result in a waiver of it. *McWhirter* v. *Otis Elevator Co., supra.*

We submit that since the partial subrogee is a real party in interest a suit by it alone states a cause of action, the only defect being one of parties which is waived unless seasonable objection is made. *Delaware County* v. *Diebold Safe & Lock Co.*, 133 U. S. 473, 488; *Gaugler* v. *Chicago, M. & P. S. Ry. Co., supra;* and the opinion of the Court below (R. 10).

The government admits that the Courts have held that a partial subrogee is a real party in interest, and hence may maintain an action in its own name against the tort feasor (Br. 18). It avers that the rationale of this ruling is based on the fact that the subrogee was entitled to share in the recovery ultimately effected. Then it contends that this test of determining a real party in interest can not be reconciled with those cases dealing with loan receipts where an insured has been held to be a real party in interest, notwithstanding the fact that the insurer is entitled to share in any recovery against the tort feasor.

This argument is utterly erroneous and acutely fanciful. The record in the instant cases does not indicate that the insurers took back loan receipts from the insured. The instant suits are grounded upon the equitable doctrine of subrogation that arises independently of any contract or formal assignment. *Aetna Life Insurance Co.* v. *Middleport, supra; Liverpool and Great Western Steam Co.* v. *Phenix Insurance Company, supra.* Immediately upon

payment the insurer is subrogated to whatever rights and remedies the insured may have against the wrongdoer. The right of subrogation attaches to the cause of action that the insured has against the wrongdoer. As equitable owner of a part or the whole cause of action against the tort feasor, *a fortiori,* a subrogee has an interest in the recovery. The test is not the fact that the subrogee was entitled to share in the recovery, but rather the subrogee is the holder of a substantive right against the tort feasor that qualifies it as a real party in interest.

To overcome the ruling of the Court below that the subrogee is a real party in interest under Federal Rule 17 (a), the government urges a negative argument and contends that the insured is the most indispensable party and therefore the insured and not the subrogee is the only real party in interest. The question of indispensability is generally raised as a matter of defense. The government did not include this objection in its motions to strike the complaints in the District Court (R. 3-6). This objection was available to it by way of motion to strike under Federal Rule 19(a). This objection was not included in the Answer that the government filed. This question was not considered by the District Court and the issue was not raised on the appeal to the Court below.

It is observed that the urgency to hold the insured to be an indispensable party is now raised in this Court for the first time. It is difficult to reconcile the government's present position as it vigorously opposed the respondents' application in the District Court to add the insured as a party plaintiff (R. 6). The motion was dismissed by the District Court for coming out of time. We doubt whether this Court will countenance such legalistic maneuvers and permit the government to use such practices to defeat a substantive right conferred upon respondents by federal statute.

Aside from the inconsistent position assumed by the government in this instance, the argument now presented is without merit. The government assumes that the insured has a claim. The record does not establish this fact. The insured has no interest in the subject matter of these suits, as the respondents made full payment to her on the fire loss sustained.

The government states that without joining the insured no binding adjudication as to the existence and extent of subrogation can be obtained and payment of the insurer's judgment may not give the United States a valid discharge even *pro tanto* (Br. 13). It submits the same to meet all traditional tests as to indispensability. On the contrary, the test of indispensability is otherwise. An indispensable party is one whose interests are so bound up in the subject matter of the litigation and the relief sought that the Court cannot proceed without her, or proceed to a final judgment without affecting her interest. *Shields* v. *Barrow* (1854) 17 How. 130. See 3 Moore, Federal Practice (2nd Ed., 1948) Sec. 19.07, pp. 2150, 2151. *Div. 525, Order of Railway Conductors of America, et al.* v. *Gorman, et al.*, 133 F. 2nd, 273.

On applying the true test of indispensability it is evident that the insured has no interest that is so bound up in the subject matter of the litigation and the relief sought by the respondents to qualify her as an indispensable party. If the insured has a claim she would qualify as a necessary party. A correct statement of the rule was made by the Court below (R. 10):

> "It is clear that the property owner and other insurers, if any, are necessary parties, since their presence in the lawsuit is required to do complete justice by adjusting all rights. But they are not indispensable in the sense that a final decree cannot be made without affecting their interests or leaving the controversy in such a condition that its final determination is inconsistent with equity."

The government also contends that the insured is an indispensable party for the reason that where the insurer has paid less than the full loss, the right of action against the tort feasor remained in the property owner for the entire loss (Br. 16). In effect, the government contends that the insured is an indispensable party because it holds the naked legal title of the subrogee's equity. This is not the test. If it has no real interest in the subject matter of the suit, indispensability then precludes the insured. If the insured retains an interest in the cause of action by reason of partial subrogation, it becomes merely a necessary or proper party. The government concedes that this was the common law rule and was applied by some Courts prior to the adoption of the Federal Rules of Civil Procedure (Br. 16). Evidently the government wants this Court to re-invoke the rigid common law doctrine and deny relief to a subrogee whose substantive rights are equitable. In modern practice a single civil action is commenced to enforce either legal or equitable rights. Federal Rule 3. In an attempt to buttress this feeble contention the government erroneously states that an insurer is not entitled to the rights of equitable subrogation unless the full amount of the insured's loss has been paid (Br. 17). To accept this statement of the law denies the very existence of a partial subrogee, a party whom the government has recognized to have certain substantive rights throughout the entire proceedings.

Subrogation depends upon payment and arises whether an insurer makes partial or whole payment to the insured. In the case of *Liverpool and Great Western Steam Co.* v. *Phenix Insurance Company*, 129 U. S. 397, 462, this Court held as follows:

> "An insurer of goods, upon paying to the assured the amount of a loss, total or partial, becomes, without any formal assignment, or any express stipulation to that effect in the policy, subrogated in a corresponding amount to the assured's

> right of action against the carrier, and may assert that right in his own name in a court of admiralty."

A similar doctrine was applied in regard to fire insurance. In the case of *St. Louis, I. M. & S. Ry. Co.* v. *Commercial Union Insurance Company*, 139 U. S. 223, 235, this Court stated:

> "In fire insurance, as in marine insurance, the insurer, upon paying to the assured the amount of a loss of the property insured, is doubtless subrogated in a corresponding amount to the assured's right of action against any other person responsible for the loss."

The government also urges that the insured is an indspensable party because the rights of a subrogee are subordinate and to permit a subrogee to sue in its own name makes it co-equal with the subrogor (Br. 17). This statement is erroneous and misconceives the fundamental doctrine of subrogation. We submit that the subrogee stands in the very shoes of the subrogor, enjoys the very substantive rights that accrue to the subrogor in a cause of action against the tort feasor. The rights are identical and the parties stand on the same level in asserting these rights against the wrongdoer. We submit that the foregoing argument of the government is legally deficient, contradictory on application and wholly irrelevant in attempting to establish the fact that an insured is an indispensable party.

The government criticizes the opinion of the Court below and charges that the Court drew an erroneous analogy on comparing a subrogee to a partial assignee as an aid in reaching the decision that a partial subrogee is a real party in interest under Federal Rule 17 (a). The analogy is a perfect one as a subrogee is an equitable assignee by operation of law. See the very learned discussion of the entire subject in 3 Moore, Federal Practice (2nd Ed., 1948) Sec. 17.09.

We shall reply briefly to the absurd argument that the government advances to support this erroneous contention. The determination of the right of a subrogee to sue in its own name as a real party in interest depends on whether or not it has a substantive right sought to be enforced. The solution of this question cannot be resolved on the basis of alleged complications and difficulties of the right of subrogation, the alleged denial of a valid discharge of tort feasor's obligation to insured on payment to subrogee, or that the insured accepted a compromise figure from insurer and intends to recover a greater amount from the tort feasor (Br. 14-16). In advancing this unsound argument it is eminently clear that the government is unfamiliar with the practice in a usual subrogation matter involving a tort feasor. It is a simple procedure securing to the subrogee its equitable right in the insured's cause of action against the tort feasor. We see no complications and difficulties existing in applying this doctrine of subrogation in a proper case. Vance, 2nd Ed., pp. 669, 670.

The government seeks protection to deal only with the insured and settle the claim directly with it. It is concerned that payment to a subrogee, or recovery of a judgment in favor of subrogee in its own name, would expose it to double liability and will not result in a valid discharge of its obligation to the insured (Br. 15).

We maintain that such practice would expose the government to greater peril and to a real rather than a potential liability of double payment. If a tort feasor is liable to the insured for a loss, and effects a settlement with the latter who obtains a release from all liability, with knowledge, actual or constructive, of the fact that the insurers have already paid to the insured the amount of the loss, the settlement and release will in no way affect the insurer's right of subrogation as against the tort feasor, since the settlement and release will be in fraud of the insured's rights, and consequently void. *Fire Association*

of Phila. v. *Wells,* 84 N. J. E. 484; 8 Couch on Insurance, Sec. 2001. This rule is likewise applicable in a case where the insured recovers a judgment against the tort feasor. *Martin* v. *Lehigh Valley R. R. Co.,* 90 N. J. L. 258. Since the government has knowledge of the subrogation rights of the respondents, it could not obtain a valid discharge on settlement and payment to the insured. We offer the government greater protection in dealing with the subrogee rather than the insured.

In opposing the right of a subrogee to sue in its own name the government suggests a cure by permitting the subrogees to intervene as parties plaintiff in an action filed by the insured. We find the following language in the government's brief (Br. 10):

> "By intervening as parties plaintiff under Civil Rule 24, they can protect their equitable interest by obtaining an express declaration in the judgment of their right to payment out of its proceeds (Cases cited)."

The right to intervene is predicated upon the right to sue. *Employers Fire Insurance Co.* v. *United States, supra,* If a subrogee has the right to intervene, *a fortiori,* a subrogee has the right to sue in its own name as a real party in interest. The subrogee or insured in a proper case involving partial payment of a total loss is a real party in interest. *Williams* v. *Powers,* 2 F. R. D. 362. Either may sue in its own name. Either party may intervene in an action filed by the other. Therefore, it cannot be urged that the insured is the *only* real party in interest.

We submit that a subrogee should not be relegated to the role of an intervener. The subrogee is the holder of a substantive equitable right against the tort feasor. It has paid the loss resulting from the tortious conduct of the wrongdoer. It should be permitted to sue in its own name as a real party in interest to protect its equitable substantive rights. The assertion of this right should not

depend upon the election of the insured to sue in its own name. If the insured should fail or refuse to file suit, the insurer is left without a remedy since no action is pending in which the subrogee can intervene. Under such circumstances, the government tort feasor would never be required to pay damages for the tort it committed and thus be the recipient of an unjust and inequitable windfall.

This brief is a direct reply to the matters raised by the government in the brief that it filed with this Court. This was compelled because of the shifting position of the government in each Court. An examination of the government's brief discloses that it is largely devoted to matters beyond the record, and particularly outside the grounds of the motions filed in the District Court. Under the Federal Rules of Civil Procedure the motions were made under Federal Rule 12 (b) (6); "failure to state a claim upon which relief can be granted." The motions raised no questions with respect to the matters covered by subdivisions ~~(1)~~-(5) inclusive of that rule, relating to lack of jurisdiction over the subject matter and person, improper venue, insufficiency of process and insufficiency of service of process. At the time no other defenses could be raised by motion under the Federal Rules. The failure to join an indispensable party was subsequently added. Federal Rule 12 (b) (7).

The cases in their present position do not, therefore, present any question as to non-joinder of parties; as to whether or not the insurers are the real parties in interest under Federal Rule 17 (a); nor as to whether or not there has been a splitting of a single cause of action resulting in multiplicity of suits. This Court may readily dismiss all of these objections for the reason that none of them has been raised by any motion or pleading by the government.

CONCLUSION

Since an insurance company subrogee is the holder of an equitable substantive right under the Tort Claims Act, we submit that in view of the decision of the Court below and in view of the argument herein made, the right of a subrogee to sue in its own name as a real party in interest under Federal Rule 17 (a) remains inviolate. This right should not be limited by a strained extension and application of R.S. 3477, nor should this absolute right to assert a cause of action affirmatively be impaired or destroyed by the several objections raised by the government in respect to the statutory and administrative protection it seeks in the prosecution of tort claims. The Federal Rules of Civil Procedure, a flexible and resilient code, promulgated by this Court, if properly invoked, affords the government as it does to a private litigant, adequate protection in litigation arising under the Tort Claims Act.

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below be affirmed.

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